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November 20, 2007

VIA HAND DELIVERY

Marlene H. Dortch

Secretary

Federal Communications Commission

445 12th St., SW

Washington, D.C. 20554

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

DOCKET FILE COPY ORIGINAL

Re: *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172*

Dear Ms. Dortch:

With less than three weeks remaining in the statutory 15-month period for review and disposition of its forbearance petitions in the above-captioned proceeding, Verizon has filed an *ex parte* letter in which it attempts to convince the Commission to abandon the multi-faceted analysis it used in the *Omaha Forbearance Order*¹ and focus exclusively on a single element of the proof a petitioning party must show in order to justify forbearance from Section 251(c)(3) unbundling requirements.² The rationale for this eleventh hour ploy is clear: Verizon realizes that it has not met even the most modest requirements the Commission laid out in the *Omaha*

¹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007) ("*Qwest Omaha*").

² Letter from Evan T. Leo, Counsel to Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 16, 2007) ("*Verizon Nov. 16th Ex Parte*").

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Forbearance Order in any of the six Metropolitan Statistical Areas (“MSAs”) for which it has sought forbearance. Its filing is a last minute attempt to convince the Commission to abandon important aspects of the *Omaha* analysis so that it might prevail despite the merits.³ The Commission should reject Verizon’s maneuver, consider the totality of the evidence, and reject Verizon’s Petitions in their entirety.

Verizon reduces the analytical framework adopted and applied in the *Omaha Forbearance Order* to a single inquiry, *i.e.*, “whether competition is possible, not whether (or to what extent) actual competition is already occurring.”⁴ Verizon contends that the Commission’s analysis should begin and end with a review of “the extent of [the incumbent cable operator’s] network facilities and . . . its ability to use those facilities . . .”⁵ In Verizon’s view, actual competition and the actual customer penetration achieved by facilities-based carriers in particular product and geographic markets are irrelevant to the Commission’s judgment of whether forbearance from Section 251(c)(3) unbundling obligations is justified. Verizon is absolutely wrong.

While the scope of “coverage” of facilities-based carriers’ networks certainly is relevant to the forbearance analysis, it is clearly not the only element (or even the threshold aspect) of the forbearance analysis.⁶ Verizon suggests that its exclusive focus on *potential* competition here is supported by the analytical framework the Commission employed in reaching Section 251(c)(3) impairment determinations.⁷ This argument is unavailing. The

³ The discussion in this letter of the analytical framework employed by the Commission in the *Omaha Forbearance Order* is not intended as an endorsement of that framework *en toto*. We believe the Commission’s forbearance analysis should be conducted separately for each product market and should include a thorough review of the nature and extent of wholesale competition. Further, reliance on predictive judgment should have no place in the Commission’s forbearance analysis.

⁴ *Verizon Nov. 16th Ex Parte*, at 6 (emphasis omitted).

⁵ *Id.*, at 1. *See also, id.*, at 5 (“Thus, in the *Omaha* and *Anchorage* orders, the Commission rejected market share as a primary indicia of competition, and instead relied on ‘facilities coverage’ of cable voice services.”).

⁶ Importantly, Verizon also ignores the fact that the analysis of facilities-based providers’ network coverage must be product market specific. In other words, the Commission must at least consider separately for residential (mass market) and business (enterprise market) customers whether the facilities coverage threshold set in the *Omaha Forbearance Order* has been met. *See Omaha Forbearance Order*, at ¶ 69.

⁷ *Verizon Nov. 16th Ex Parte*, at 6.

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Commission never has concluded that its forbearance determinations should be subject to the same standard used to decide whether impairment exists. To the contrary, the Commission has recognized that, unlike in impairment dockets, *actual* competition is critical to its forbearance determinations and has held that only where there is "sufficient facilities-based competition, particularly from cable companies, [might] the state of local exchange competition [] justify forbearance."⁸

Thus, before any analysis of facilities coverage is warranted, the Commission must review the state of actual competition in a particular MSA. A more granular inquiry into whether facilities-based competitors meet the *Omaha* network coverage requirement on a wire center-by-wire center basis only is necessary or appropriate if the Commission has first concluded that competitors have achieved at least the level of market penetration in an MSA found to exist in the Omaha MSA at the time of the *Omaha Forbearance Order*. Here, the evidence is clear and convincing that the market share requirements of the *Omaha Forbearance Order* have not been met in any of the six MSAs at issue.

The undersigned carriers have shown time and again that actual competition in the residential and business markets in Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach is nowhere near the level that existed in Omaha at the time of the *Omaha Forbearance Order*.⁹ In a November 13, 2007 filing, Time Warner Cable's residential market share throughout its service territory in the New York MSA was shown to be approximately *one-fifth* the level of market penetration believed to have been achieved by Cox at the time of the *Omaha Forbearance Order*.¹⁰ Not surprisingly, Time Warner Cable's business market share

⁸ *Omaha Forbearance Order*, at ¶ 63.

⁹ See, e.g., Comments of Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC, WC Docket No. 06-172, (filed Mar. 5, 2007) ("*Broadview, et al. Comments*"); Reply Comments of Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC, WC Docket No. 06-172, (filed Apr. 18, 2007) ("*Broadview, et al. Reply Comments*"); Letter from Broadview Networks, Inc., et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Sept. 4, 2007) ("*September 4th Ex Parte*"); Letter from Brad E. Mutschelknaus, Counsel to Covad Communications Group, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 5, 2007) ("*Nov. 5th Ex Parte*").

¹⁰ Letter from Brad E. Mutschelknaus, Counsel to Covad Communications Group, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 13, 2007) ("*Nov. 13th Ex Parte*"), at 2. Cablevision, the other major

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was found to be even lower, registering a barely-discernible **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent.¹¹ Cable provider market penetration in the remaining five MSAs was detailed in a follow-up filing.¹² Overall cable-based market penetration in the Boston MSA was found to be a mere **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent.¹³ Comcast, the incumbent cable provider in the Philadelphia and Pittsburgh MSAs, reported that its residential market share in the Philadelphia MSA (stated in terms of homes passed) is only **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent and its residential market share in the Pittsburgh MSA (stated in terms of homes passed) is only **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent.¹⁴ Cox and Comcast are the major incumbent cable providers in the Providence MSA and their aggregate market share in Providence is only **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent.¹⁵ MSA-wide aggregate business market penetration in the Providence MSA is a mere **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent.¹⁶ MSA-wide residential market penetration in Providence is **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent,¹⁷ but it is still nowhere close to

incumbent cable provider serving the New York MSA, has not made its data available for review and analysis until today.

¹¹ *Id.*, at 3.

¹² Letter from Brad E. Mutschelknaus, Counsel to Covad Communications Group, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 16, 2007) ("*Nov. 16th Ex Parte*").

¹³ *Id.*, at 3. The **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent market share includes customers served in the Boston MSA by Comcast, Charter, and RCN. Although this market share figure encompasses both residential and business markets, it is attributable almost entirely to competition in the residential market since Comcast is just beginning to roll out business offerings and Charter serves a miniscule **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** business lines in the Boston MSA. *Id.*

¹⁴ *Id.*, at 5. Although Comcast did not file market penetration data for the business market, as noted above, it has only recently begun offering business services so its business market share in the Philadelphia and Pittsburgh MSAs is likely to be negligible.

¹⁵ *Id.*, at 3-4.

¹⁶ *Id.*, at 4.

¹⁷ *Id.*

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the level understood to exist in Omaha at the time of the *Omaha Forbearance Order*. Finally, in the Virginia Beach MSA, residential market penetration by Cox,¹⁸ the incumbent cable provider in that market, is **BEGIN HIGHLY CONFIDENTIAL *** [] *** END HIGHLY CONFIDENTIAL** percent.¹⁹

It should be kept in mind, however, that even if cable-based penetration in any of the six MSAs at issue were at the level believed to have been achieved by Cox in the Omaha MSA at the time of the *Omaha Forbearance Order* (which it is not), that fact alone would not be sufficient to meet the market penetration requirements for forbearance. To ensure that the significant anti-competitive effects of a duopoly market do not occur, it is critical that multiple facilities-based competitors offering substitutable services meet the forbearance requirements in a particular product and geographic market. It is a misreading of the *Omaha Forbearance Order* to conclude that the Commission has found that a duopoly is sufficient to pass muster under Section 10. If Verizon faces a single facilities-based competitor in a particular wire center, the wire center is not sufficiently competitive to protect against the risks of tacit collusion between Verizon and the competitor that would necessarily lead to restricted service choices and higher prices for consumers.²⁰ Congress certainly subscribed to the view that a cable/ILEC duopoly would not constitute sufficient competition to warrant removal of incumbent local exchange carrier ("ILEC") unbundling obligations when it adopted the 1996 Telecommunications Act. At the time of passage of the 1996 Act, Congress believed that the cable companies would enter the telephony market quickly and on a wide scale.²¹

¹⁸ *Id.*, at 5. Cox has not yet produced market penetration data for the business market in the Virginia Beach MSA.

¹⁹ It is not surprising that although Verizon contends that the data submitted by the cable companies "corroborate[s] the totals in the residential E911 data that [it] has submitted," *Verizon Nov. 16th Ex Parte*, at 9, and "confirm[s] that cable companies . . . are successfully and aggressively competing for business customers," *id.*, at 11, Verizon has never calculated actual cable-based residential or business market share percentages for any of the six MSAs at issue. Clearly, Verizon has not submitted these figures because they do not support its contention that sufficient facilities-based competition exists to meet the standard enunciated in the *Omaha Forbearance Order*.

²⁰ *See September 4th Ex Parte*, at 8-11.

²¹ In a March 1995 Hearing before the Senate Committee on Commerce, Science and Technology, Decker Anstrom, President and CEO of the National Cable Association, "testified that NCTA supports telecommunications legislation because the cable industry is ready to compete . . . cable will be the competing wire to the telephone industry, and cable's coaxial cable carries 900 times more information than telephone's twisted copper

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Notwithstanding this belief, Congress saw fit to include Section 251(c) – with its imposition of significant unbundling obligations on ILECs – in the final legislation.

Notwithstanding its contention that it would be “inappropriate”²² for the Commission to focus on market share in reaching its Section 251(c)(3) forbearance determinations (but perhaps in tacit recognition that its contention is at odds with *Omaha Forbearance Order* requirements), Verizon urges the Commission to include competition from intermodal competitors (in particular, wireless and over-the-top VoIP providers) in its analysis of the state of competition in the six MSAs at issue.²³ More specifically, Verizon submits that the Commission should consider Verizon’s share of mass-market connections in each of the six MSAs when these alternatives (*i.e.*, wireless and VoIP) are taken into account.²⁴ According to Verizon, its share of mass market voice connections ranges from a high of **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL** to a low of **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL**.²⁵ In Verizon’s view, these figures show that “competitive conditions” in the six MSAs are far above what is required to make a showing of effective competition.²⁶

Verizon’s attempt to convince the Commission (through the inclusion of “estimates” of wireless and over-the-top VoIP subscribers) that sufficient actual mass market competition exists in the six MSAs to warrant forbearance is equivalent to a “Hail Mary” pass with two seconds left on the game clock.²⁷ First, as pointed out by numerous parties in their

pair.” *Telecommunications Competition and Deregulation Act of 1995: Report of the Committee on Commerce, Science, and Transportation on S.652*, 104th Cong. (1995) (Statement of Decker Anstrom, President & CEO, National Cable Association). *See also Joint Explanatory Statement of the Committee of Conference*, 104th Congress, 2nd Session, Washington, D.C. (1996) (“Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated.”).

²² Verizon Nov. 16th *Ex Parte*, at 6.

²³ *Id.*, at 6-9.

²⁴ *Id.*, at 7.

²⁵ *Id.*, at 8.

²⁶ *Id.*, at 9.

²⁷ Importantly, Verizon’s attempt to include wireless and VoIP usage in the forbearance analysis is directed exclusively to the mass (*i.e.*, residential) market. Verizon does not

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initial comments, over-the-top VoIP services cannot be included in the Commission's forbearance analysis because these services are simply not a source of facilities-based competition.²⁸ These services, by definition, ride the facilities of another provider, which in many cases is likely to be Verizon itself.²⁹ The Commission has stated unequivocally that facilities-based competition is the only relevant competition for purposes of determining whether the Section 10 forbearance criteria have been satisfied.³⁰ Therefore, inclusion of VoIP-based competition in the forbearance analysis clearly is inappropriate.

Further, wireless services cannot be included in the Commission's forbearance analysis because Verizon has failed to make the fact-specific showing the Commission has stated is required before any refinement of the *Omaha* standard to include wireless is possible. In the *Omaha Forbearance Order*, the Commission determined that the lack of specific data concerning the substitutability of . . . wireless services in *[the Qwest] service territory in the Omaha MSA*³¹ was an absolute impediment to any consideration of wireless in its Section 251(c)(3) forbearance analysis.³² Here, Verizon has "assumed that 16 percent of households have cut the cord, and that 75 percent of wireless subscribers are served by carriers other than Verizon."³³ The basis for these assumptions are generalized nationwide reports and estimates.³⁴

contend that wireless and VoIP usage is significant enough to warrant a Commission finding of sufficient competition for enterprise (*i.e.*, business) services.

²⁸ See, e.g., Comments of Broadview Networks, Inc., et al., WC Docket No. 06-172 (filed Mar. 5, 2007), at 42-44; Comments of the City of Philadelphia, WC Docket No. 06-172 (filed Mar. 5, 2007), at 18.

²⁹ Verizon itself has pointed out that an "underlying broadband connection [is] needed for VoIP service" and VoIP providers "do not operate their own loop and transport networks." See, e.g., Verizon Petition – New York, at 13.

³⁰ *Omaha Forbearance Order*, at ¶ 60.

³¹ *Id.*, at ¶ 72 (emphasis supplied).

³² The Commission made a similar finding in the *Anchorage Forbearance Order*, noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study area. *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, at ¶ 29 (2007).

³³ *Verizon Nov. 16th Ex Parte*, at 7.

³⁴ *Id.*

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Verizon has provided absolutely no data showing (or, at a minimum, estimating) wireless usage and substitutability in the six geographic markets for which it is seeking forbearance. In the absence of any market-specific evidence, there is no basis (or justification) for the Commission to deviate from the course adopted in *Omaha*.

Verizon also expends some effort in its *Nov. 16th Ex Parte* in an ongoing attempt to convince the Commission that its wireline access lines are declining and that this decline is directly attributable to competition in the six MSAs at issue.³⁵ This tired argument was initially raised by Verizon in its Petitions and was completely debunked in comments and reply comments.³⁶ Now, Verizon has produced a series of charts purportedly illustrating declines in wireline access lines and purportedly showing that “but for losses to competition,” nationwide (as of June 2006) there would have been 86 million more wireline access lines “[it] would have been expected to serve” than actually existed as of that date.³⁷ More specifically, Verizon has produced a chart for each of the six MSAs at issue and these charts allegedly show that as of June 2006 there were between **BEGIN CONFIDENTIAL *** [**

***** END CONFIDENTIAL** fewer wireline access lines than would have existed but for competition.³⁸

Verizon’s efforts are completely disingenuous. In order to obtain an accurate picture of wireline access line usage, it is essential that *all* access lines – not just switched access lines – be taken into account. While switched access lines are decreasing in number, other wireline access lines, including special access and broadband connections (*i.e.*, FiOS), are

³⁵ *Id.*, at 4-5.

³⁶ See, e.g., *Broadview, et al. Comments*, at 25-26; Comments of the National Cable and Telecommunications Association, WC Docket No. 06-172, at 9-10 (filed Mar. 5, 2007); Opposition of Cavalier Telephone Subsidiaries to Verizon’s Petitions for Forbearance, WC Docket No. 06-172, at 15-16 (filed Mar. 5, 2007); ., Comments of the National Association of State Utility Consumer Advocates, the Pennsylvania Office of Consumer Advocate, the Public Utility Law Project of New York, Inc., the Massachusetts Office of Attorney General, the Maryland Office of People’s Counsel, the New Jersey Division of Rate Counsel, the New Hampshire Office of Consumer Advocate, and the Connecticut Office of Consumer Counsel, WC Docket No. 06-172, at 61-66 (filed Mar. 5, 2007); Sprint Nextel Corporation’s Opposition to Petitions for Forbearance, WC Docket No. 06-172, at 13-14 (filed Mar. 5, 2007).

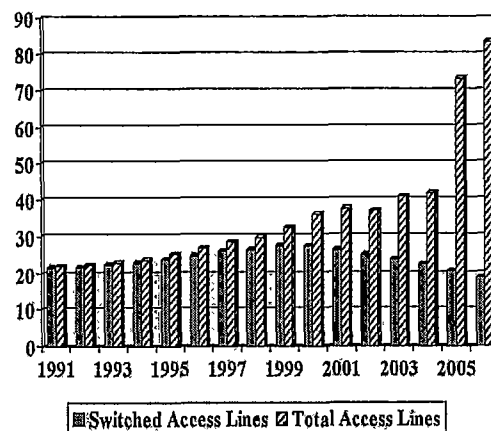
³⁷ *Verizon Nov. 16th Ex Parte*, at 4 and Figure 1.

³⁸ *Id.*, at Attachment B.

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experiencing significant growth.³⁹ As detailed in the chart below, once all access lines are included in the analysis, it can be seen that access line usage in Massachusetts, New York, Pennsylvania, Rhode Island, and Virginia has increased – in several recent years dramatically – virtually every year since 1991.⁴⁰

Total Access Lines Are Continuing to Grow in Forbearance States
Switched and Total Access Lines (Millions)
Massachusetts, New York, Pennsylvania, Rhode Island, and Virginia



The state-specific results, shown in Attachment A, are similar and show that particularly in recent years (2003-2006), total access line usage has increased significantly year to year.⁴¹

³⁹ Indeed, in its most recent 10-Q, Verizon states that it is “devoting more resources to higher growth markets such as . . . wireline broadband connections, including fiber optics to the premises, Verizon’s high-capacity fiber network (FiOS Internet and TV services), digital subscriber lines (DSL) and other data services, as well as expanded strategic services to business markets, rather than to the traditional wireline voice market.” Verizon Communications Inc., Form 10-Q, Securities and Exchange Commission, at 31 (filed Oct. 30, 2007) (“*Verizon 10-Q*”).

⁴⁰ Total wireline access usage has decreased in only one year since 1991 and in that year, 2002, the decrease was modest.

⁴¹ An underlying current that runs through Verizon’s efforts to show access line losses is the notion that it is losing significant revenue due to decreases in access lines and forbearance is necessary or justified to counterbalance this revenue loss. Perhaps not surprisingly, Verizon’s recent 10-Q tells a different story. Verizon reported to the Securities and Exchange Commission last month that its wireline revenues had “remained

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In sum, Verizon's latest attempt to show that it has met the prerequisites for Section 251(c)(3) forbearance, like each of its previous submissions, falls far short of the mark. Verizon has not proven that the Section 10 forbearance standard (as interpreted and applied in the *Omaha Forbearance Order*) is met in any product or geographic market in any of the six MSAs at issue. Thus, its Petitions must be denied in their entirety.⁴²

Respectfully submitted,



Brad E. Mutschelknaus
Genevieve Morelli

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Communications Group, NuVox
Communications, and XO Communications,
LLC*

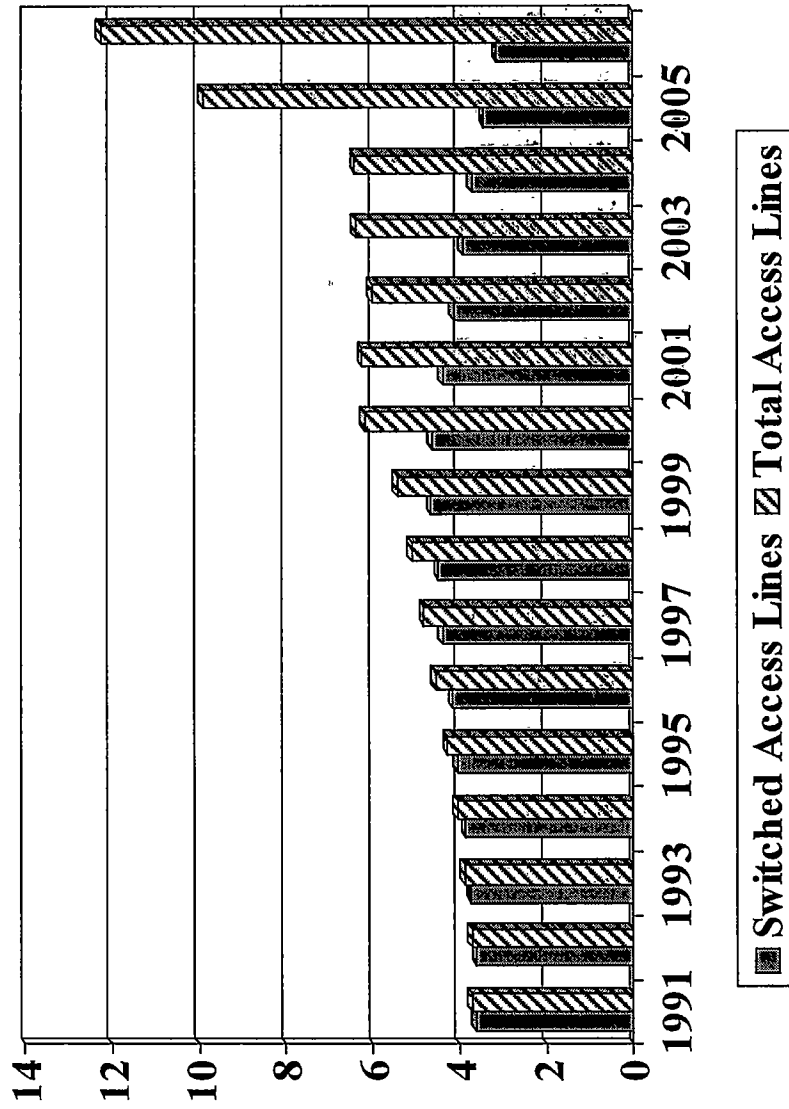
stable" in the previous quarter and that wireline revenues for the nine months that ended September 30, 2007 decreased a miniscule 0.6%. *See Verizon 10-Q*, at 31, 35.

⁴²

Further, Verizon's Petitions should be seen for what they are, *i.e.*, a thinly-veiled attempt to renege on the fundamental bargain struck in the *Triennial Review Order*. The "new wires/new rules old wires/old rules" concept advocated by Verizon and others and embraced by the Commission in the *Triennial Review Order* afforded Verizon freedom from unbundling requirements for new facilities and technologies in return for continued unbundling of current network facilities. With the instant Petitions, Verizon is attempting to eliminate the unbundling obligations that formed the *quid pro quo* for the deregulation it obtained in that order.

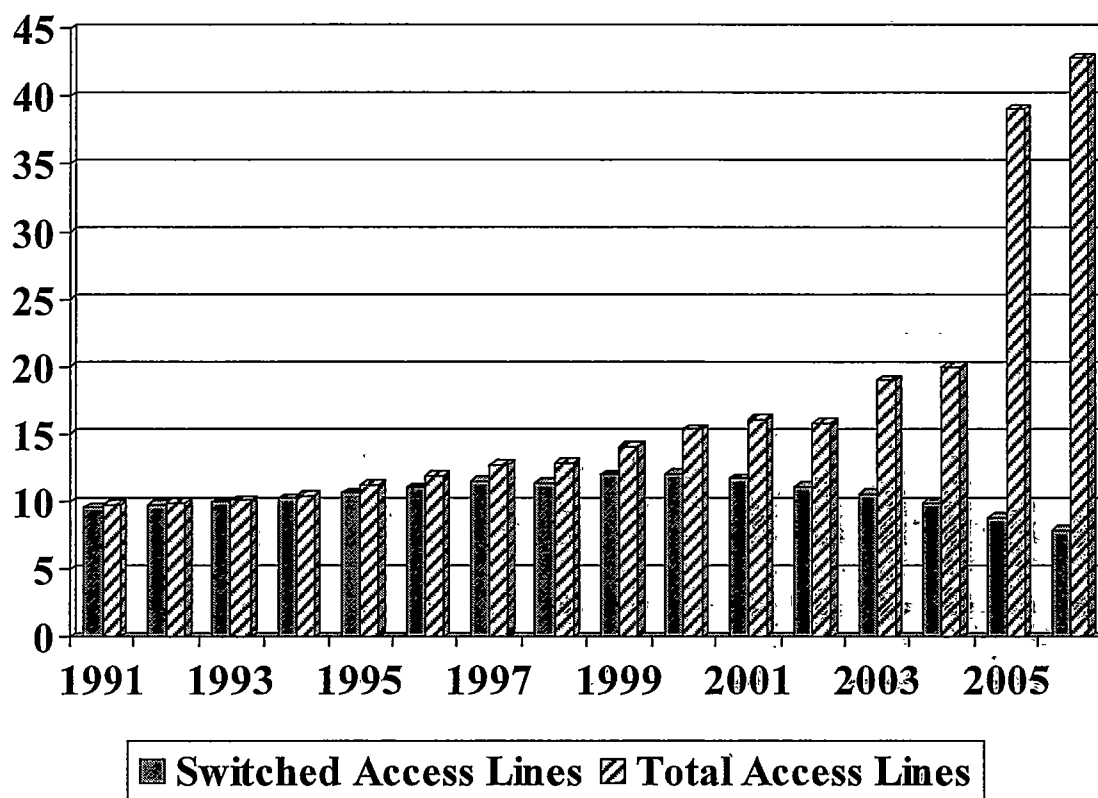
ATTACHMENT A

Total Access Lines Are Continuing to Grow in Massachusetts
Switched and Total Access Lines (Millions)



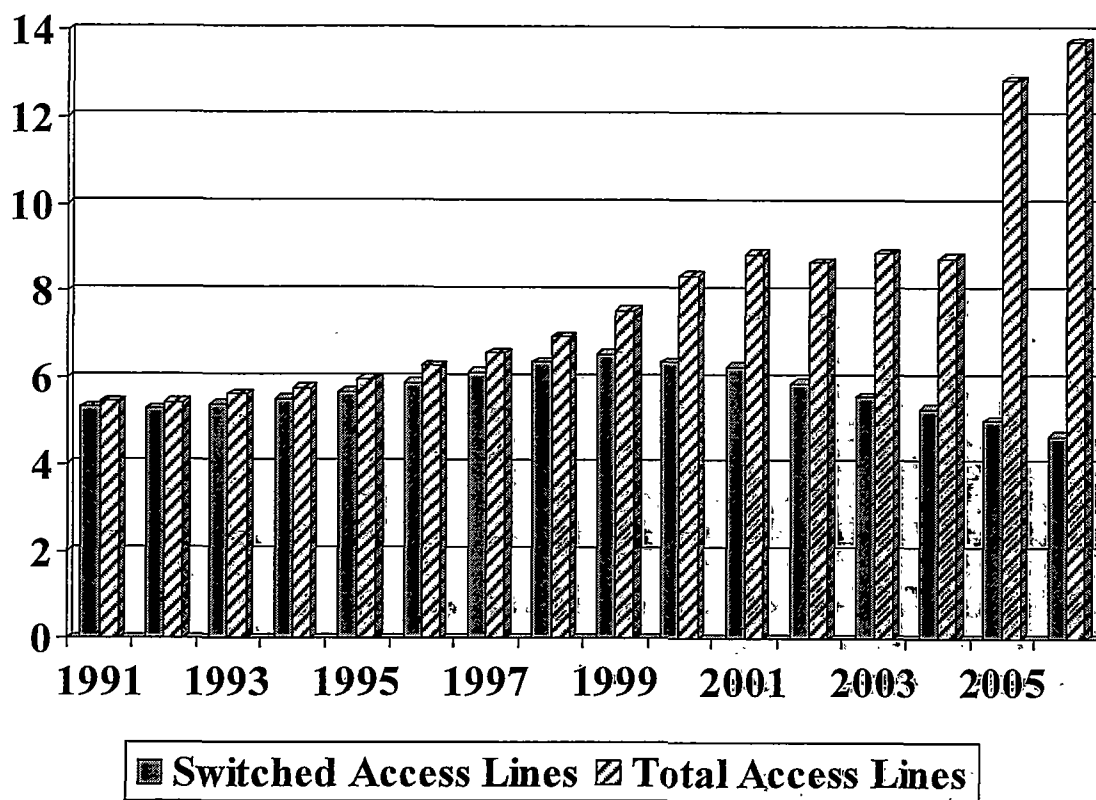
Total Access Lines Are Continuing to Grow in New York

Switched and Total Access Lines (Millions)



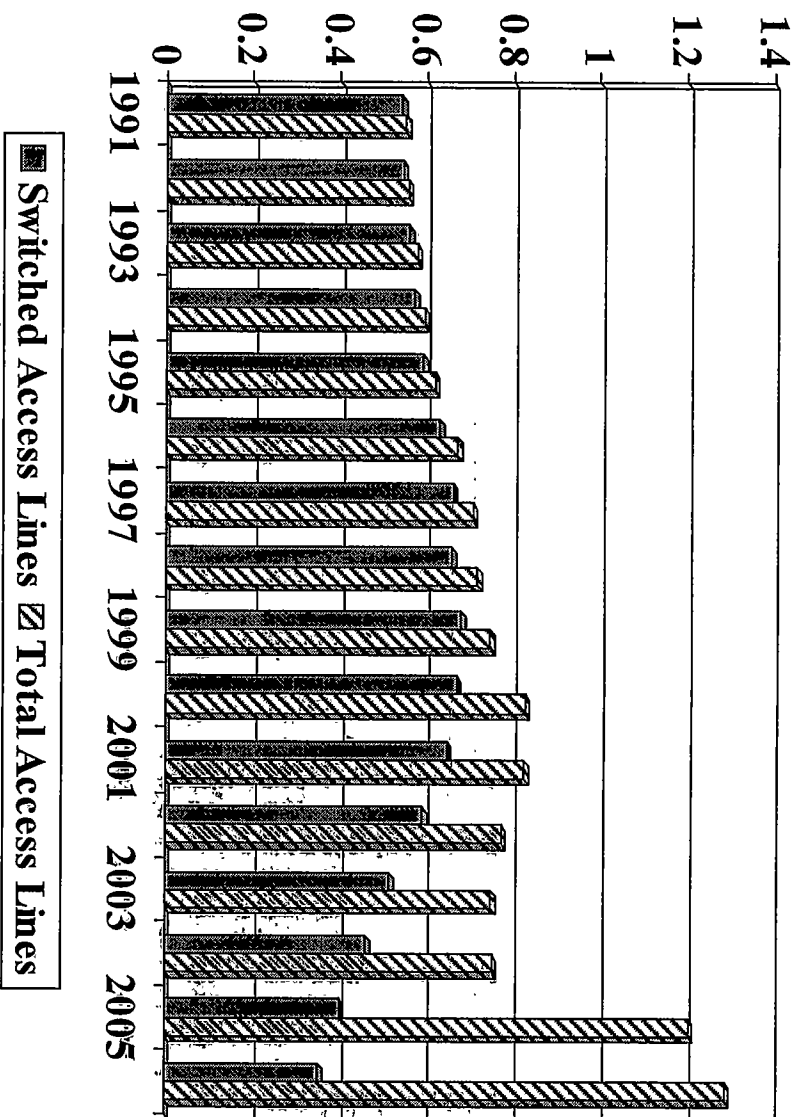
Total Access Lines Are Continuing to Grow in Pennsylvania

Switched and Total Access Lines (Millions)



Total Access Lines Are Continuing to Grow in Rhode Island

Switched and Total Access Lines (Millions)



Total Access Lines Are Continuing to Grow in Virginia

Switched and Total Access Lines (Millions)

